SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 503

IN THE MATTER

of

The Application of the RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, for an order directing the transfer of its assets and funds to the STATEN ISLAND MENTAL HEALTH SOCIETY, INC.

STATEN ISLAND MENTAL HEALTH SOCIETY, INC.,

Appellant,

RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, THE CHILDREN'S AID SOCIETY, MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN and the STATE OF NEW YORK,

Respondents.

JURISDICTIONAL STATEMENT.

MARLAND GALE,
LEONARD M. LEIMAN,
Counsel for Appellant, Staten Island Mental Health Society, Inc.,
26 Broadway,
New York 4, N. Y.

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JURISDICTIONAL STATEMENT.

Appellant appeals from the order of the New York Court of Appeals entered May 18, 1961, affirming an order of the Appellate Division of the Supreme Court, Second Department, entered July 20, 1960, which latter order dismissed the appellant's appeal. Appellant submits this statement to show that this Court has jurisdiction of this appeal and that substantial federal questions are presented.

(Unless otherwise noted, *italics* are ours.)

Opinions Below

The New York Court of Appeals handed down no opinion. Its decision, by a four to three division, is found in Appendix A. The Appellate Division opinion appears in 11 A. D. 2d 236. The opinion of the Supreme Court at Special Term, awarding the funds *cy pres*, was not reported. Its opinion denying a new trial is found in 8 Misc. 2d 123. All opinions are set forth in Appendix A, as is a copy of the order appealed from.

Jurisdiction

This is a statutory *cy pres* proceeding under Section 56 of the New York Membership Corporations Law. Its purpose, as the caption shows, was to obtain an order transferring charitable funds to the appellant. After a trial without a jury, orders were entered by the New York Supreme Court for Richmond County on June 21 and July 9, 1957. These orders awarded all the funds to intervenors, none to the appellant, and denied appellant's motion for a new trial and other relief. Appellant's appeal from both orders was dismissed by the Appellate Division of the Supreme Court, Second Department, by order entered July 20, 1960, solely because of appellant's asserted lack of standing. By order entered May 18, 1961, the New York Court of Appeals affirmed the dismissal in a four to three decision without opinion. Appellant's notice of appeal here was filed August 7, 1961[1] in the Supreme Court of Richmond County. On June 9, 1961, on appellant's motion, the remittitur was amended to allow costs, but the court declined to add to the remittitur a statement that it had necessarily passed on federal questions. Nevertheless, all questions now urged here were fully raised by the appellant

[1] The time to docket the case was enlarged to October 20, 1961 by order of a Justice of the New York Supreme Court, Richmond County, dated September 28, 1961.

in all state courts and, in fact were necessarily *decided* adversely to the appellant.

The statutory provision believed to confer jurisdiction of this appeal to this Court is 28 U. S. C. sec. 1257(2).

Cases believed to sustain the jurisdiction of this Court are: *Wolfe* v. *North Carolina*, 364 U. S. 177; *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203; *Torasco* v. *Watkins*, 367 U. S. 488; *McGowan* v. *Maryland*, 366 U. S. 420; *Two Guys from Harrison* v. *McGinley*, 366 U. S. 582; *Braunfield* v. *Brown*, 366 U. S. 599; *Gallagher* v. *Crown Kosher Supermarket*, 366 U. S. 617; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282.

Statutes Involved

The statutes which (as applied in this case) are believed to be repugnant to the Constitution of the United States, are Section 56 of the New York Membership Corporations Law and Section 557 of the New York Civil Practice Act. Also involved are Section 552 of the Civil Practice Act, Rule 221 of the Rules of Civil Procedure of the State of New York, Article 6, Section 18 of the Constitution of the State of New York, Section 373 of the New York State Social Welfare Law and Section 11 of Regulations of the Department of Welfare of the City of New York, entitled "Interagency Manual of Policies and Procedures, Bureau of Child Welfare." Pertinent excerpts are set forth in Appendix B.

Questions Presented

The questions presented by this appeal arise in the following circumstances:

A statutory *cy pres* proceeding was instituted by directors of a dissolved *non-sectarian* charitable corporation,

seeking to transfer all its funds (including funds bequeathed by two Moravian testators) to the appellant, also a *non-sectarian* charity, which the petitioners believed to be closely kindred. The appellant, which had participated in the petition and as a party in all subsequent proceedings, was given nothing. The trial court's order directed the funds to be divided between two intervenors; one of them was a *sectarian* institution of the Roman Catholic faith, which was awarded all the trust funds bequeathed under one will, half the funds under the other. The appellant appealed from this order and from a second order denying its motion for a new trial and other relief, relying on constitutional grounds, among others. Long after the time to appeal had expired, the two intervenors first questioned the appellant's standing by moving to dismiss the appeal on the ground that the appellant was not a "party aggrieved" under section 557 of the New York Civil Practice Act.

The motion was granted by the Appellate Division and affirmed by the order here appealed from. In a decision totally contradictory to all prior New York cases and to the understanding of both the Attorney General and the appellant, it was held for the first time in New York that only the State Attorney General could appeal from such a *cy pres* order, even though he had not participated in the appeal nor joined in the motion to dismiss and, in fact, had dropped out of the case.

In these circumstances, the questions presented by this appeal are:

1. Are the state statutes, namely, subdivision 5 of Section 56 of the New York Membership Corporations Law (L. 1909, c. 40, as amended by L. 1928, c. 476, L. 1933, c. 108 and L. 1948, c. 788) and Section 557 of the New York Civil Practice Act, as applied in this case, repugnant to

the due process and equal protection clauses of the Fourteenth Amendment and the establishment of religion clause of the First Amendment to the United States Constitution?

2. Did the procedural order dismissing the appeal rest on tenable and adequate grounds of state law, even though the order (a) was novel and inconsistent with prior New York decisions, (b) was prejudicially retroactive in effect, (c) operated discriminatorily against the appellant and (d) interposed a burden on the assertion of appellant's federal claims?

3. May a state court of original jurisdiction constitutionally be vested with *cy pres* prerogative which is not reviewable by any court, including this Court, to direct the judicial transfer of nondenominational charitable funds to a sectarian charity for sectarian uses—including giving minor children committed to its care religious instruction in one faith only—against the considered judgment of the director-trustees of the fund and in disregard of the evidence, solely because the state Attorney General drops out of the case, or simply fails to take corrective action?

4. Was the appellant denied due process of law and equal protection of the laws because the novel order dismissing the appeal was applied prejudicially and retroactively, considering that

(a) the stated ground of dismissal was that the Attorney General had exclusive standing to prosecute such appeals, although the Attorney General himself had previously and consistently disavowed this power and thereafter dropped out of the case?

(b) no one questioned the appellant's standing to appeal except the intervening respondents, although they had waived the point below, long before the

time to appeal had expired, by answering on the merits a motion made by the appellants for a new trial, which, under New York Law could have been made only by "a party aggrieved" having standing to appeal?

5. Was the appellant denied due process of law and equal protection of the laws because the order appealed from constituted "an *ad hoc* determination operating discriminatorily against" the appellant, so as to *prevent the appellant or anyone else* from raising substantial questions arising under the Constitution of the United States?

Statement of the Case

The original petitioner, Richmond County Society for the Prevention of Cruelty to Children, will be referred as *"SPCC"* and the successful intervenor-respondent, Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children, as the *"Mission"*.

When the petition was filed in this case, the SPCC had been dissolved by proclamation pursuant to §57 of the Membership Corporations Law, but its charter had not been cancelled. It could simply have filed a certificate of reinstatement, paid a $5 fee and then merged with the appellant. Instead, it chose to proceed under the *cy pres* statute, with a strong case to support the directors' judgment. No New York decision had ever transferred nonsectarian funds to a sect. *In re Rupprecht,* 297 N. Y. 462, stood to the contrary. Every reported New York case had permitted appeals by *cy pres* claimants.

It was in these circumstances that the SPCC directors filed their petition in which the appellant participated as a necessary original party.

Included in the SPCC funds were residuary gifts, one a trust fund, under the Atkins and Spratt wills. Both testators were members of the United Brethren's Church, of the Moravian faith, to whom each testator made specific bequests.

The appellant and the Attorney General each answered. A number of charities were permitted to intervene. At the trial without a jury, Frank Maloy, President of the SPCC (and a director of Catholic Youth Organization) testified that in the judgment of the directors the appellant was best qualified to receive the SPCC funds, as opposed to any intervenor. He made it clear that the funds had been raised and used solely on a nondenominational basis. The close similarity between the appellant and the SPCC was shown by testimony and exhibits.

Special Term disregarded the directors' judgment, gave no funds to the appellant, but divided them among two intervenors, including the sectarian Mission. The opinion did not mention any evidence but relied on the bare conclusion that the chosen beneficiaries of the order were "most nearly akin" to the SPCC (p. A-8).

The ambivalent and prejudicial role of the State Attorney General.

Even a concise summary requires reference to the role played by the State Attorney General.

The stated ground for dismissing the appellant's appeal was that only the Attorney General could appeal, and that *his* failure to act precluded the *appellant or anyone else* from raising what the Appellate Division itself characterized as "questions of interest and importance". But the Attorney General himself had never claimed this exclusive right; indeed, he had expressly disclaimed it. It had been

his announced policy—in cases involving more than one *cy pres* claimant—to leave it to counsel for the respective claimants to present all questions of law and fact at the trial and on appeal. Until this decision individual claimants had a right to be heard on appeal.

These proceedings were started, in fact, under the benevolent aegis of the Attorney General's staff, who advised all parties as to matters of procedure. The Attorney General favored intervention and broad notice to possible claimants, but disavowed any intention to speak for individual charities or to advise the court on the merits. This was consistent with his previously announced policy in *cy pres* cases involving multiple claimants. *In re Petroleum Research Fund,* 3 Misc. 2d 790, where the Attorney General categorically advised the court that he did not speak for individual organizations.

Before the appellant's appeal was filed in this case, the Attorney General's office informed appellant's counsel that the Attorney General would not participate in the appeal since he was satisfied that counsel for the individual charities would adequately present all issues of fact and law on the appeal.

The Attorney General did not participate in the motion to dismiss the appellant's appeal.

On April 5, 1960, however, shortly before the argument of the appeal, the Solicitor General expressed his views in a letter addressed to the Presiding Justice, copies of which were sent to all counsel, saying:

> "1. The Attorney General submits that the Staten Island Mental Health Society ought, in the interests of justice, be accorded the right to be heard on the appeal, having participated in the proceedings below.
>
> 2. The distributee should be an institution of the same nature—*i.e.,* nonsectarian or sectarian, as the

> case may be, as the dissolved corporation (Matter of *Rupprecht*, 297 N. Y. 462), a principle which seems to have been violated by the decision of the Court below."

But this letter was not followed up. The Attorney General dropped out of the case.

Thus the Attorney General: at the outset advocated free intervention, including public advertising for intervenors; when they appeared, announced that he would not speak on the merits or for any party, and did not do so; accordingly left the burden of the appeal entirely to the appellant; declined to participate in the intervenors' motion to dismiss the appeal; stood mute when the constitutionality of the statute and of the award to the Mission was questioned; and, finally, completely disassociated himself from the case.

Dismissal of the Appeal.

It is against this background of inaction by the Attorney General that the appellate courts, for the first time, held that an appeal could be taken *only* by the Attorney General. Every prior case had permitted appeals by unsuccessful claimants (pp. 10-12, *infra*). Yet the Appellate Division, affirmed by the Court of Appeals in a four to three decision, held that appellant had no standing to appeal—even though appellant was an original named party in the petition by which the action was commenced, and had participated in every phase of the proceeding without its standing ever being questioned. Since the time to appeal had run out long before the decision of the Appellate Division was rendered, its effect was necessarily to make unreviewable the unconstitutional award of the trial court.

The Federal Questions Are Substantial.

A. The dismissal of the appeal was prejudicially retroactive and a denial of due process and equal protection of the laws.

That the decision is not consistent with prior New York cases is clear, not only from cases to be cited, but from the close division of the Court of Appeals and the fact that costs were awarded to the appellant from the fund. Handed down long after the time of everyone to appeal had expired, the decision was also both retroactive and prejudicial, a condition which was compounded by the conduct of the Attorney General. In all these circumstances the retroactive application of such a novel rule was a denial of due process, *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, creating discriminatory "novelty in procedural requirements", *National Association for Advancement of Colored People* v. *Alabama*, 357 U. S. 449.

As construed by the courts below, the statute preventing appellant from appealing as a "party aggrieved" is unconstitutional. This would be true were the issues sought to be raised exclusively issues of state law. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673. But it is especially true when, as here, the novel procedural decision frustrated presentation by the appellant of serious federal questions under the establishment of religion clause.

That the decision was novel and prejudicially retroactive is clear from a brief review of the New York law from earliest times.

New York courts had previously granted similar appeals as of right.

Despite language in the appellate court opinion (p. A-8), New York courts from the beginning of the Repub-

lic have granted appeals as a matter of right in all similar cases. In one case the point was raised by a motion to reverse an order of intervention. *Matter of Directors of Equitable Fire Insurance and Police Fund*, 267 App. Div. 761. In no adversary proceeding involving more than one claimant did the Attorney General appeal. In case after case the Appellate Divisions and the Court of Appeals permitted *cy pres* claimants to appeal as of right. *In re Rupprecht's Will*, 297 N. Y. 462; *Matter of Durbrow*, 245 N. Y. 469; *In re Marvin's Estate*, 262 App. Div. 903, aff'd 287 N. Y. 622; *Matter of Lawless*, 194 Misc. 844, aff'd 277 App. Div. 1045, app. den. 302 N. Y. 949; *Matter of Directors of Equitable Fire Insurance & Police Fund*, 267 App. Div. 761; *Matter of Dug-Out, Incorporated*, 286 App. Div. 1003. In every one of these cases the Attorney General was a respondent; he did not appeal.[1]

The last two cases arose under the same statute as is involved here, §56 of the Membership Corporations Law.

The present decision reverses 173 years of New York law prohibiting prerogative *cy pres*.

New York never accepted the judicial prerogative of the Crown. Unlike some states, it did not receive the Statute of Elizabeth, 43 Eliz. ch. 4, which created an unreviewable prerogative in the chancellor in *cy pres* cases; on the contrary, New York repealed the Statute in 1788, *Williams* v. *Williams*, 8 N. Y. 525, where the Court of Appeals said, at page 548:

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[1] When only one charity is involved, so that there is no adversary proceeding, the Attorney General takes an active part in appeals. *Trustees of Sailors' Snug Harbor* v. *Carmody*, 158 App. Div. 738, aff'd 211 N. Y. 286; *Matter of Scott*, 8 N. Y. 2d 419. But in *Snug Harbor*, the position of the Attorney General was rejected, and he was overruled in part in *Scott*.

> "... we have no magistrate clothed with the prerogatives of the Crown and our courts are entrusted only with judicial authority."[2]

To the same effect: *Owens* v. *Missionary Society,* 14 N. Y. 380; *Beekman* v. *Bonsor,* 23 N. Y. 298; *Bascom* v. *Albertson,* 34 N. Y. 584.

Recognizing that *cy pres* proceedings are judicial in character, and not prerogative, New York from the earliest times permitted appeals by charitable claimants as of right. *Williams* v. *Williams,* 8 N. Y. 525; *Owens* v. *Missionary Society,* 14 N. Y. 380; *Phelps' Executor* v. *Pond,* 23 N. Y. 69; *Bascom* v. *Albertson,* 34 N. Y. 584.

No jurisdictional question in New York.

The right to entertain *cy pres* appeals never involved a jurisdictional question in New York. Indeed the appellate court may itself bring in a new party claimant, as it did in *Sherman* v. *Richmond Hose Co. No. 2,* 186 App. Div. 417, aff'd 230 N. Y. 462. In *Matter of Scott,* 8 N. Y. 2d 419 (1960) a new participant in the fund was suggested in the appellant's brief to the Court of Appeals. The broad inherent power of an appellate court to bring in an entirely new claimant for the first time on appeal must include the lesser appellate power to hear a claimant who was a necessary party below.

The Massachusetts rule was improperly assimilated.

Although existing New York law placed no obstacle in the way of appellant's appeal, the Court here turned to

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[2] While the *Williams* case was later reversed, it was reinstated by the Tilden Acts, L. 1893, ch. 701, now section 12 of the Personal Property Law and section 113 of the Real Property Law. *Matter of Scott,* 8 N. Y. 2d 419 (1960). The principle, however, is unchanged: judicial prerogative still forms no part of the law of New York.

Massachusetts and Connecticut cases. *Bolster* v. *Attorney General*, 306 Mass. 387; *First Christian Church* v. *Brownell*, 332 Mass. 143; *Waterbury Trust Co.* v. *Porter*, 130 Conn. 494.

But Massachusetts had expressly adopted the Statute of Elizabeth, which New York rejected, *Sanderson* v. *White*, 35 Mass. 328, and Connecticut "virtually reenacted" the Statute, *American Bible Society* v. *Wetmore*, 17 Conn. 181, 189. The *Waterbury Trust* case was almost exactly like *Phelps' Executor* v. *Pond*, 23 N. Y. 69, 74. Yet *Phelps'* allowed an appeal as of right. Furthermore the functions and responsibilities of the Attorney General have historically been very different in Massachusetts. There, he "as representing the Crown, is the protector of all persons interested in charity funds; *in Massachusetts, the Attorney General exercises cy pres powers. Burbank* v. *Burbank*, 152 Mass. 88. Similarly, Connecticut: *Averill* v. *Lewis*, 106 Conn. 582. Massachusetts denies intervention where it would be permitted here (as it was in this case). *Dillaway* v. *Burton*, 256 Mass. 568.

In short, the sudden forced transplantation of the Massachusetts rule to New York violated the traditions, decisions and statutes of New York, and served only to interpose a new discriminatory burden on the assertion of federal claims. *Wolfe* v. *North Carolina*, 364 U. S. 177; *National Association for Advancement of Colored People* v. *Alabama*, 357 U. S. 449, 455, 457-8; *Staub* v. *Baxley*, 355 U. S. 313, 318-20; *Ward* v. *Love County*, 253 U. S. 17, 22; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282; *Rogers* v. *Alabama*, 192 U. S. 226; *Central Union Telegraph Co.* v. *Edwardsville*, 269 U. S. 190, 194-5.

B. The award to the Mission was an unconstitutional grant of nonsectarian funds to a sectarian institution.

The interpretation by the court below of the New York Civil Practice Act, retroactively denying appellant—and every other party in the proceeding—the right to appeal, renders the statute unconstitutional for the reasons above stated. In these circumstances, it is respectfully suggested that the appropriate procedure for this Court to follow is that adopted in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, which this case closely resembles: to remand the proceeding to the courts of New York State for decision on the merits. However, in the event that the underlying federal issues are considered by this Court (cf. *National Association for the Advancement of Colored People* v. *Alabama,* 357 U. S. 449), it is equally clear that the *cy pres* statute of New York, permitting the award of nonsectarian funds to a sectarian institution, is also unconstitutional. These issues have never been decided by this Court.

1. The award to the Mission, if it is sectarian, was State judicial action which violated the Fourteenth Amendment.

Judicial action is, of course, invalid if it contravenes the Fourteenth Amendment. *Shelley* v. *Kraemer,* 334 U. S. 1; *Barrows* v. *Jackson,* 346 U. S. 249. The "establishment of religion" clause of the First Amendment has been made applicable to state action. *Torasco* v. *Watkins,* 367 U. S. 488; *McGowan* v. *Maryland,* 366 U. S. 420; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Everson* v. *Board of Education,* 330 U. S. 1; *Illinois, ex rel. McCollum* v. *Board of Education,* 333 U. S. 203; *Zorach* v. *Clauson,* 343 U. S. 306.

2. The Mission is sectarian in every respect.

As is made clear in this case:

(1) The Mission is sectarian in its avowed "purpose and objective" to "p ide a thorough Catholic training to children accepted by the Mission".

(2) The Mission gives instruction in only the Roman Catholic faith to the children in its care.

(3) The Mission solicits funds on a sectarian basis among Catholics, to whom it offers "spiritual benefits" by way of prayer.

All this is shown by the Mission's official publication at page 17, *infra*.

(4) The Mission restricts admittance to children of the Roman Catholic faith, as the Mission proved in *People ex rel. Choolokian* v. *Mission of the Immaculate Virgin,* 300 N. Y. 43, where it introduced into the record (fols. 704-7) a letter from its Admitting Secretary, saying:

> ". . . if the children are to remain at the Mission they should be here as Catholics and if they are not to conform with their religious obligations and duties, they should be transferred elsewhere without delay".

See also the standard reference book, "Directory of Social and Health Agencies of New York City", Columbia University Press (1960), p. 198, as to the Mission:

> "For dependent Catholic children, 4-16 years. Cottage and group plan. Elementary grades, vocational training, academic and vocational high school. Adm. [i. e., admission] of private charges through Catholic Charities of the Archdiocese of New York."

(5) *In order to function as it does, the Mission is required to be sectarian by the Constitution and laws of New York* and the regulations of the Department of Welfare of New York City. If it were not sectarian, it would not legally qualify to admit the Catholic children committed to its care or to receive public funds for their maintenance.

Article 6, §18 of the New York Constitution requires that child commitments, when practicable, be to an "institution governed by persons .... of the same religious persuasion as the child", as does §373(1) of the New York Social Welfare Law. The purpose is to "assure" that in child care "its religious faith shall be preserved and protected", §373(4). This policy is not to be overridden except in extreme circumstances. *In re Maxwell's Adoption,* 4 N. Y. 2d 429. In the City of New York even extraordinary "out-of-religion" placements may be made only "with any suitable agency which will provide religious training in the child's religious faith." N. Y. C. Dept. Welfare Regs. Ch. 2, Sec. 11 d 1, of which the Court should take judicial notice. New York City Administrative Code, §982-8.0.

What has been said about the Mission is quoted from its own publication which the Mission's counsel submitted as a factual exhibit in its post-trial memorandum. This memorandum was one of the papers before the trial court and is referred to in one of its orders appealed from. The memorandum was submitted without objection to the Appellate Division in duplicate; but neither copy could be found after the argument. All that is now available are four reproduced pages to the use of which the Mission's counsel waived objection in a letter sent to all counsel of record.

The four pages, which were also submitted to the Court of Appeals, follow:

attached as an exhibit in a brief submitted by the Mission at the conclusion of the trial.

The Homeless Child

and Messenger of St. Joseph's Union

VOLUME LXXXIII — MISSION OF THE IMMACULATE VIRGIN — 1956 EDITION





"So long as you did it to one of these, My least brethren, you did it to Me" MATT. 25:40.







Some of the youngest and the oldest children at Mt. Loretto.

Excerpt from official publication of Mission attached as an exhibit in a brief submitted by the Mission at the conclusion of the trial.

ST. JOSEPH'S UNION

WHAT IT IS – WHAT IT DOES – FOR YOU – FOR US

What Is St. Joseph's Union?

Who Founded St. Joseph's Union?

Why Was It Founded?

When Was St. Joseph's Union Founded?

What Are the Spiritual Benefits?

Who May Enroll in St. Joseph's Union?

Why Should You Enroll in St. Joseph's Union?

An Invitation

If you do not accept our invitation to become a promoter we prayerfully hope you will at least become a member of St. Joseph's Union that you may be a part in the Christlike work of giving a home to orphan, neglected and destitute children.

•

All communications to be sent to

ST. JOSEPH'S UNION

381 Lafayette Street

New York 3, N. Y.

Excerpt from official publication of Mission attached as an exhibit in a brief submitted by the Mission at the conclusion of the trial.

The Homeless Child AND MESSENGER OF ST. JOSEPH'S UNION

OUR REPORT
TO PROMOTERS AND MEMBERS

T



Mt. Loretto Farm, Central Section, Staten Island

Social Service Department

The Aim and Purpose of Mount Loretto

A series of technical procedural state court rulings and the ambivalence of the State Attorney General have caused an unconstitutional invasion of charitable giving.

In this case New York has established a novel, far-reaching doctrine that judicial *cy pres* prerogative is unreviewable, even though it diverts nondenominational funds to sectarian uses, unless a busy public official, never before charged with the duty, affirmatively and promptly intervenes.

This is a reversion to the very "sin" and "tyranny" which Jefferson fought. *McGowan* v. *Maryland*, 366 U. S. 420, 465 (separate opinion). Men and women have been "compelled to furnish contributions of money for the propagation of opinions" which they "disbelieved". Bequests of good church-going Moravians, with other interdenominational gifts, have been awarded to a good Catholic institution which will use the money to rear and instruct Roman Catholic children in the Roman Catholic faith, as indeed it is required to do by State law. The decision is reminiscent of ancient evil which, it was thought, was long ago exorcised, at least in New York. In *Da Costa* v. *De Pas*, 1 Amb. 228, 2 Swanst. 447, the Crown in 1784 exerted its unreviewable prerogative on the sign manual, or direction, of the Attorney General to award a bequest intended for the teaching of the Jewish religion, which was then illegal in England, for instruction in the *Christian* faith.

Yet in 1961 the state courts in New York have shifted the burden to a now reluctant Attorney General, who was never previously thought to have such responsibility, and have retroactively made *his* default an insurmountable obstacle to the assertion of federal constitutional claims by anyone.

The opinion below recognized that "The questions raised are of interest and importance." The funds are "public property . . . consecrated to the public use", *The Late Church Corporation* v. *United States*, 136 U. S. 1, 59. Benefactors who contribute to such funds should have a fundamental right to select denominational or nondenominational charities of their own choosing. The Constitution, we would assume, protects the devout in gifts to the religions of their faiths. But the great American tradition of giving does not stop there. Persons of different faiths unite in a common charitable effort to fill needs which cut across group lines, particularly here, where the problems of children are not confined by sect. It is as sinful and tyrannical to frustrate the interdenominational purposes of community giving as to reach in and strip the coffers of a church. But by series of technical procedural rulings the courts have permitted this to occur, and the Attorney General has failed to protest.

Private philanthropy in the United States now exceeds $8 billion annually. More than two-thirds of this vast sum is given to religious and educational uses of many types. With rapid shifts in the economy and new social awareness, *cy pres* has an increasingly important function to preserve the original charitable intention. But, whatever the shifts, *cy pres* courts should not have unreviewable power to favor one religion over another, or to grant non-religious funds to any sect.

The Federal Questions Were Argued Below.

The federal questions now relied on by the appellant were fully raised in the state courts by way of brief and argument. At Special Term appellant filed a brief at the conclusion of the trial, arguing against the award of any

funds to the Mission on the ground that its orphanage gave religious instruction in the Catholic faith (p. 19). On its motion for a new trial and other relief, before any order had been entered, appellant, in objecting to the award to the Mission, referred specifically to the "fundamental constitutional right to religious liberty".

Appellate Division briefs.

Before the Appellate Division, the appellant fully briefed and argued the constitutional points, citing the authorities now relied on, under the following heading IV:

> "In ordering a transfer of the funds to The Mission of the Immaculate Virgin the Court acted in violation of the First and Fourteenth Amendments of the United States Constitution".

In appellant's reply brief before the Appellate Division, on page 10, it was said:

> "Here the Court, by its own action, ordered the transfer of public funds from nondenominational to sectarian uses. This was an unconstitutional act."

Court of Appeals briefs.

The constitutional issues were extensively briefed and were argued in the Court of Appeals. Point II in the appellant's main brief read as follows:

> "This Court should reverse the novel decision of the Appellate Division on the ground that it denies federal due process and equal protection of the laws.
>
> A. The orders at Special Term were violative of the Amendments.
>
> B. The decision and order of the Appellate Division were violative of due process."

The following issues were among those presented to the Court of Appeals in appellant's brief (p. 6):

> **"2. In the absence of action by the Attorney General, are the *cy pres* orders of a court of original jurisdiction unreviewable on appeal by a responsible claimant to a fund, after a hearing on notice to 'all persons, firms and corporations interested,' even though**
>
> **. . .**
>
> **"(c) the court violated the First and Fourteenth Amendments of the United States Constitution?**
>
> **3. Does the novel ruling of the Appellate Division dismissing our appeal in itself constitute a denial of due process and equal protection of the laws?**
>
> **"4. Is the statute . . ., as applied in the exceptional circumstances of this case, constitutional under the Fourteenth Amendment?"**

The appellant's position was summarized in its reply brief in the Court of Appeals as follows (p. 4):

> **"In short, a federal question is presented on both grounds as to whether the statute (i.e., Section 56 of the Membership Corporations Law, read in conjunction with Section 557 of the Civil Practice Act), as applied in the particular circumstances of this case, deprives the appellant of federally protected due process and equal protection of the laws."**

In rendering decision against the appellant, the Court of Appeals necessarily upheld the state statutes against the appellant's attack that they were unconstitutional, *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Largent* v. *Texas*, 318 U. S. 418.

One set of all appellant's briefs before the Appellate Division and Court of Appeals is submitted with this Statement.

Conclusion

WHEREFORE, it is respectfully submitted (1) that this Court has jurisdiction of this appeal under §1257(2), Title 28, U. S. C.; (2) that this Court may find this case an appropriate one for reversal without plenary consideration and oral argument; and (3) that this case be referred back to the Court of Appeals of the State of New York for determination by the courts of the State of New York of the questions presented by the appellant's appeal, and for such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

Marland Gale,
Leonard M. Leiman,
Counsel for Appellant Mental Health Society, Inc.

New York, N. Y.
October 13, 1961

Appendix A.

Decision of Court of Appeals, May 18, 1961.

In the Matter of Richmond County Society for the Prevention of Cruelty to Children, Respondent. Staten Island Mental Health Society Inc., Appellant; Children's Aid Society et al., Respondents;

(9 N. Y. 2d 913)

(Memoranda)

(Decided May 18, 1961)

Order affirmed, without costs; no opinion.

Concur: Chief Judge Desmond and Judges Dye, Burke and Foster. Judges Fuld, Froessel and Van Voorhis dissent and vote to reverse and to remit the matter to the Appellate Division for decision, upon the ground that the appellant was recognized as an interested party at Special Term and must be deemed an aggrieved party for the purposes of appeal.

Decision of Court of Appeals on Motion to Amend Remittitur, June 9, 1961.

(10 N. Y. 2d 746)

"Motion to amend the remittitur granted and the remittitur amended to read as follows: Order affirmed with costs in this Court to all parties filing separately and filing separate briefs payable out of the funds. Motion otherwise denied."

Appendix A.

Order of Court of Appeals, May 18, 1961, Appealed From.

COURT OF APPEALS

STATE OF NEW YORK, SS.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of May in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS,

The Hon. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur May 18, 1961

IN THE MATTER

of

the Application of the Richmond County Society for the Prevention of Cruelty to Children, for an Order &c.

STATEN ISLAND MENTAL HEALTH SOCIETY, INC.,

Appellant,

RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, & ORS.,

Respondents.

BE IT REMEMBERED, That on the 2nd day of February in the year of our Lord one thousand nine hundred and sixty-

one, Staten Island Mental Health Society, Inc., the appellant in this cause, came here unto the Court of Appeals, by Hodges, Reavis, McGrath & Downey, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Richmond County Society for the Prevention of Cruelty to Children, & ors., the respondents in said cause, afterwards appeared in said Court of Appeals by L. W. & A. B. Widdecombe, & ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Marland Gale, of counsel for the appellant, and by Mr. Vincent R. FitzPatrick, of counsel for the respondent Mission, and by Mr. John A. Lynch, of counsel for the respondent Society, no appearance for the remaining respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended to read as follows: Order affirmed, with costs in this Court to all parties appearing separately and filing separate briefs, payable out of the fund. Motion otherwise denied.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of

New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of
the State of New York.

Decision and Opinion of Appellate Division, Second Department, Dismissing Appeal (July 20, 1960).

11 A. D. 2d 236.

Per Curiam.

This appeal involves the application of the *cy pres* doctrine to the distribution of the funds of Richmond County Society for the Prevention of Cruelty to Children, a dissolved charitable corporation. The proceeding was instituted in December, 1954 by the petition of 8 of the 9 directors of that Society, pursuant to Section 56 of the Membership Corporations Law, for an order authorizing the transfer of all its funds, assets and securities to the Staten Island Mental Health Society, Inc., "or such other corporation or corporations as to the Court may seem just and proper". The petition alleged that the Society for the Prevention of Cruelty to Children was incorporated in 1880 pursuant to the Membership Corporations Law, for the purposes of "the prevention of cruelty to children and the enforcement of the laws relating to or in any wise affecting children", that it ceased to operate in 1949, and that it was dissolved in 1952. It was also alleged that Staten Island Mental Health Society was incorporated in November, 1954, pursuant to the Membership Corporations Law, "to establish and operate a mental health clinic including mental health services for neglected and delinquent children" and that, in the judgment of the petitioning directors, the objects and purposes of Mental Health and

the Society for the Prevention of Cruelty to Children were kindred.

An order to show cause was issued on the petition, directing the giving of notice, personally and by publication, to various persons who might be interested in the proceedings, including the Attorney-General, the members of the Society for the Prevention of Cruelty to Children and the contributors to its funds. Thereafter, Mental Health served what was designated as an answer in support of the application, which described its purpose and activities at length and which was designed to show how closely its work was related to that formerly carried on by the Society for the Prevention of Cruelty to Children. The Attorney-General also served an answer "as the sole, inherent and statutory representative of the indefinite and uncertain beneficiaries of gifts, grants, devises or bequests to religious, educational or benevolent uses or purposes pursuant to Section 12 of the Personal Property Law and Section 113 of the Real Property Law" and requested that the court "exercise all its inherent and statutory powers including the *cy pres* power", in determining the proper disposition of the funds.

A number of charitable or eleemosynary organizations were permitted to intervene in the proceeding. Among those so intervening were the Children's Aid Society and the Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children. After a hearing, the Special Term held that the general purposes and activities of the Children's Aid Society and the Mission were "most nearly akin to those of the dissolved corporation, and that the intent and purpose of the donor and contributors to that corporation will best be accomplished by distribution of its assets equally to them" and directed that the assets of the Society for the Prevention of Cruelty to Children be distributed equally between the Children's Aid Society and the Mission, to be used and administered by them

"solely in furtherance of their work and activities within the County of Richmond."

Appellant moved for a new trial or in the alternative for a further trial, reargument and other relief. That motion was denied and this appeal from the orders entered on the original determination and on the motion followed. There was no appeal by the other unsuccessful organizations, and the only respondents filing briefs are the Children's Aid Society and the Mission.

The Children's Aid Society and the Mission heretofore moved to dismiss the appeal on the ground that appellant was not a party aggrieved, but this court, by order dated February 24, 1958, denied the motion with leave to renew on the argument of the appeal. Pursuant to such permission, those respondents again urge that the appeal should be dismissed.

Their arguments are persuasive and, in our opinion, must be sustained.

It was the duty of the Special Term to provide that the funds of the Society for the Prevention of Cruelty to Children be transferred to such other corporation or association as the Special Term should specify to be administered or used in such manner as in its judgment would best accomplish the general purposes for which such Society was organized (Membership Corporations Law, §56). That duty, which required the application of the *cy pres* doctrine, involved a large measure of discretion (*Sherman* v. *Richmond Hose Co.*, 230 N. Y. 462, 473; *City Bank Farmers Trust Co.* v. *Arnold*, 283 N. Y. 184, 195). In determining that the funds should not be transferred to appellant for such purposes, the Special Term violated none of appellant's substantial rights, since appellant had no legal right to any of the funds and had no interest in, or responsibility with respect to, their disposition. An appeal may be taken to this court in a special proceeding only by a party or person aggrieved (Civ. Prac. Act, §557) by an order which affects a substantial right (Civ. Prac. Act, §631) and the test in such event is whether the person

seeking to appeal has a direct interest in the controversy which is affected by the result and whether the adjudication has a binding force against the rights, person or property of the party or person seeking to appeal (*Matter of Fleming*, 223 App. Div. 849; *Grabb* v. *Nicholas*, 2 A. D. 2d 446, 447; *Isham* v. *New York Assn. for Poor*, 177 N. Y. 218, 222; *Ross* v. *Wigg*, 160 N. Y. 243, 246). If, as appellant asserts, the disposition made will result in an improper administration of the funds for purposes not contemplated by the charter of the Society for the Prevention of Cruelty to Children or by the donors of its funds, because of the sectarian aspects of the charitable activities of the Mission, the parties aggrieved, other than the donors, are the unnamed and indefinite beneficiaries of the charitable work formerly carried on by the Society for the Prevention of Cruelty to Children, whose interests are in the care of the State as *parens patriae*, and who are represented exclusively by the Attorney-General (cf. *Trustees of Sailors' Snug Harbor* v. *Carmody*, 158 App. Div. 738, 756; *Palluffi* v. *Montross*, 199 Misc. 220; *Revici* v. *Jewish Material Claims against Germany*, 11 Misc. 2d 354; *Matter of James*, 123 N. Y. S. 2d 520). The Attorney-General appeared on their behalf and participated actively in this proceeding but has taken no appeal from the determination sought to be reviewed. Appellant has no standing to appeal on their behalf (cf. *Matter of Hodgman*, 140 N. Y. 421, 430; *Matter of Durbrow*, 245 N. Y. 469, 477; *Bolster* v. *Attorney General*, 306 Mass. 387; *First Christian Church* v. *Brownell*, 332 Mass. 143; *Waterbury Trust Co.* v. *Porter*, 130 Conn. 494) nor, since it had no legal right or interest in the funds transferred, to argue that the award to the Mission violated the First Amendment to the United States Constitution (cf. *Schieffelin* v. *Komfort*, 212 N. Y. 520, 533; *Bull* v. *Stichman*, 273 App. Div. 311, 313, affd. 298 N. Y. 516). No donor of the funds to be transferred has objected to the disposition made at Special Term, nor has the Attorney-General done so on behalf of the donors. Concededly, appellant has no authority to act for them (cf. *Sherman* v.

Richmond Hose Co., 230 N. Y. 462, 467, *supra*). It is true that cases have been and may be cited in which similar appeals have been entertained. It does not appear, however, that the point was raised in any of them, and in some, the Attorney-General appealed, so that the granting of a motion to dismiss would not have disposed of the case. The questions presented are of interest and importance, and for that reason should not be passed upon until presented by some party having an actual interest in them (cf. *Bryant* v. *Thompson*, 128 N. Y. 426). Appellant has no inherent right to appeal because it was a party to the proceeding at the Special Term (cf. *State* v. *County of Kings*, 125 N. Y. 312; *Waterbury Trust Co.* v. *Porter*, *supra*). The right of appeal is entirely statutory, and in the absence of a statute authorizing appellant's application to this court for relief, we have no authority to entertain it.

The appeal should be dismissed, without costs.

Opinion of Baker, J. on transfer of funds (November 15, 1956).

By Mr. Justice Baker

Matter of Richmond County Society for the Prevention of Cruelty to Children—On the testimony and proof adduced upon the hearings held in this matter, the court finds that the respondents and intervenors, The Children's Aid Society, Inc. and Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children have established the necessary qualifications to be recipients of the assets of Richmond County Society for the Prevention of Cruelty to Children. The court finds as a fact that the general purposes and activities of these institutions are most nearly akin to those of the dissolved corporation, and that the intent and purpose of the donor and contributors to that corporation will best be accomplished by distribution of its assets equally to them. The court further finds, upon the basis of the evidence, that these two charitable

institutions have been in existence for many years and are stable financially. The proof warrants the conclusion that their work and activities will continue into the foreseeable future.

The court has given serious consideration to the claims of petitioner's nominee and of those of all other charitable institutions which intervened in this proceeding. Their work has been outstanding and of great benefit to the community. However, the proof establishes that their programs and activities are less akin to those of the dissolved corporation than those of the two institutions named above, and that the requirements of the statute will best be met by distribution of the assets as indicated.

Accordingly, it is directed that the assets and property of petitioner be distributed and transferred equally to The Children's Aid Society, Inc. and Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children, to be used and administered by them solely in furtherance of their work and activities within the County of Richmond. In effecting this equal distribution, the principal and accrued income of the trust created under the last will and testament of Emma A. Atkins shall be transferred and distributed to the Mission of the Immaculate Virgin, &c., to be used and administered in accordance with the terms of said will; a sum equal thereto shall be transferred and distributed to The Children's Aid Society and the balance of the property and assets of the dissolved corporation then remaining shall be distributed equally between them.

Petitioner is directed to serve a certified copy of the order to be entered hereon upon Chemical Corn Exchange Bank as executor and trustee under the last will and testament of Theodore H. Spratt, deceased, and upon the Clerk of the Surrogate's Court of the County of Richmond.

The petitioner and/or its surviving directors are directed to present and file their final account and serve same upon the attorney-general who may serve and file objections thereto within twenty days after such service.

Petitioner's attorney will be allowed the sum of $1,500 which the court feels is a reasonable counsel fee, together with his necessary disbursements. Settle order on notice to all parties who have appeared and to the attorney-general.

Opinion of Baker, J. Denying Motion for New Trial and Other Relief (June 20, 1957).

8 Misc. 2d 123.

By Mr. Justice Baker.

Matter of Richmond County Soc'y for the Prevention of Cruelty to Children, &c.—On November 13, 1956, the court rendered its decision in this matter directing that the remaining funds and assets of Richmond County Society, &c., a dissolved charitable membership corporation, be distributed equally to the Children's Aid Society, Inc., and Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children.

The Staten Island Mental Health Society, one of the intervenors, which was represented at the hearings and participated therein, moves for an order: (1) Directing a new trial, or, in the alternative, (2) directing a further trial for the purpose of permitting it to introduce additional and new evidence, and (3) granting reconsideration and reargument.

The grounds upon which the application is based are: (a) That the death of the reporter, whose notes taken at the trial were not transcribed, requires a new trial; (b) that since the hearings the moving party has greatly changed and enlarged its activities and functions, and (c) no hearing was held as to the appropriateness of the application of funds which fell to the dissolved society by the will of Theodore Spratt, probated after the conclusion of the hearings.

The grounds urged in support of this application will be considered in the order stated. (a) The reporter who took the minutes of the hearings died several months thereafter. His notes were not transcribed. It is argued that the Mental

Health Society is entitled to a new trial since it is unable to appeal without a record. This position is untenable. The parties may make a record on appeal from the testimony of witnesses, as disclosed by affidavits or otherwise, and the judgment roll, and settle the record on appeal before the trial justice, with the aid of his minutes (Kay *v.* Kay, 277 App. Div. 797; 6 Carmody's N. Y. Practice, sec. 256). (b) The changing, enlargement or broadening of the functions and purposes of the movant *subsequent to the conclusion of the hearings* afford no valid basis for the granting of a new trial. There is no claim nor any showing of "newly discovered evidence" sufficient to warrant the granting of the relief sought (4 Carmody's New York Practice, sec. 1433 et seq.). (c) It was unnecessary that evidence be taken at the hearings with respect to the appropriateness of the application of funds which, upon certain contingencies, might fall to the dissolved society under the will of Theodore Spratt, section 56, subdivision 5 of the Membership Corporation Law provides in part: "* * * Any device, bequest, gift or grant contained in any will or other instrument, in trust or otherwise, made before or after the dissolution to or intended for the benefit of any corporation so dissolved shall inure to or for the benefit of the corporation or association acquiring the assets of the dissolved corporation under the preceding sentence hereof, and so far as is necessary for that purpose the corporation acquiring the assets shall be deemed to be a successor to the dissolved corporation; provided, however, that all such devises, bequests, gifts or grants shall be devoted by the acquiring corporation to the purposes intended by the devisor, testator, donor or grantor. As amended L. 1948, c. 788, eff. April 5, 1948."

This court has held that the Mission of the Immaculate Virgin and the Children's Aid Society are the successors of the dissolved corporation. As such, they are entitled to share equally in the Spratt legacy.

The application is, in all respects, denied.

Appendix B.

STATUTES.

Section 56 New York Membership Corporations Law

§56. *Jurisdiction of the Supreme Court.*

In the case of a membership corporation dissolved pursuant to this article or by the expiration of its corporate existence, the supreme court, upon the petition of the surviving directors, or a majority of them, or, in a proper case, upon the petition of a creditor or member, or upon the petition of the attorney general, and upon notice to such surviving directors as are not petitioners, and notice to such other interested persons as the court may specify, to be given personally or otherwise, as it may direct, may, from time to time, order and adjudge in respect to the following matters:

• • • • • •

5. The sale and disposition of any remaining property of the corporation and the distribution or division of such property or its proceeds among the members or persons entitled thereto, except that in the case of a corporation formed for any of the purposes described in subdivision one of section eleven, and in the case of any corporation having property or funds legally required to be used for particular purposes, the court upon twenty days' personal notice to the attorney general and four weeks' notice to the members, creditors and contributors to the funds of the corporation by publication once a week for four successive weeks in two newspapers of general circulation published in the county in which the treasurer of the corporation shall reside, may make an order that such property or its proceeds shall be transferred to such other corporation or association as shall be specified, to be administered or used in

such manner as in the judgment of the court will best accomplish the general purposes for which the corporation so dissolved was organized or for which the property or funds are legally required to be used, without regard to and free from any express or implied restriction, limitation or direction imposed upon such corporation. Any devise, bequest, gift or grant contained in any will or other instrument, in trust or otherwise, made before or after the dissolution to or intended for the benefit of any corporation so dissolved shall inure to or for the benefit of the corporation or association acquiring the assets of the dissolved corporation under the preceding sentence hereof, and so far as is necessary for that purpose the corporation acquiring the assets shall be deemed to be a successor to the dissolved corporation; provided, however, that all such devises, bequests, gifts or grants shall be devoted by the acquiring corporation to the purposes intended by the devisor, testator, donor or grantor.

6. Such matters as justice may require.

Civil Practice Act.

§557. *Right to appeal generally.* A right to appeal shall exist as follows:

1. A party aggrieved may appeal in a case provided by law. He may not appeal from a judgment or order rendered or made upon his default unless an appeal therefrom be expressly authorized by law;

552. *Motion for a new trial to be made at special term.* In a case not specified in the last three sections, a motion for a new trial must be heard and decided, in the first instance, at the special term. But where it is founded upon an allegation of error,

in a finding of fact, or ruling upon the law, made by the judge upon the trial, it cannot be made unless notice therefor be given before the expiration of the time within which an appeal can be taken from the judgment, and it cannot be heard at a special term held by another judge; unless the judge who presided at the trial is dead, or his term of office has expired, or he is disqualified for any reason, or he specifically directs the motion to be heard before another judge.

New York Rules of Civil Practice.

Rule 221. *Motion for new trial at special term. The judge hearing a motion for a new trial at special term may, if he deems it necessary, direct the moving party to* make a case and procure the same to be settled and signed in the same manner as on an appeal from a judgment rendered after the trial of an issue of fact except where the motion is on the minutes of the judge who presided at a trial by a jury, or on an allegation of irregularity or surprise or except as otherwise provided by law.

Constitution of the State of New York, Art. 6 §18.

"The legislature may establish children's courts, and courts of domestic relations, as separate courts, or as parts of existing courts or courts hereafter to be created, and may confer upon them such jurisdiction as may be necessary for the correction, protection, guardianship and disposition of delinquent, neglected or dependent minors, and for the punishment and correction of adults responsible for or contributing to such delinquency, neglect or dependency, and to compel the support of a wife, child, or poor relative by persons legally chargeable therewith who abandon or neglect to support any of them. In

conferring such jurisdiction the legislature shall provide that whenever a child is committed to an institution or is placed in the custody of any person by parole, placing out, adoption, or guardianship, it shall be so committed or placed, when practicable, to an institution governed by persons, or in the custody of a person, of the same religious persuasion as the child. In the exercise of such jurisdiction such courts may hear and determine such causes with or without a jury, except those involving a felony. Adopted by the people Nov. 3, 1925, eff. Jan. 1, 1926."

New York Social Welfare Law.

"§373. *Religious faith*

"1. Whenever a child is committed to any agency, association, corporation, institution or society, other than an institution supported and controlled by the state or a subdivision thereof, such commitment shall be made, when practicable, to an authorized agency under the control of persons of the same religious faith as that of the child.

* * * * * *

"4. The provisions of subdivision one, two and three of this section shall be so interpreted as to assure that in the care, protection, adoption, guardianship, discipline and control of any child, its religious faith shall be preserved and protected."

Appendix B.

Regulations of New York City Department of Welfare, entitled "Interagency Manual of Policies and Procedures, Bureau of Child Welfare".

Definitions (p. IV)

SWL—Social Welfare Law.
DW—Department of Welfare.
BCW—Bureau of Child Welfare.

Chapter 2—Intake

Section 11—Religion as a factor in placement.

* * * * * *

"b. BCW General Policy:

1. In accordance with the statutory provisions (SWL-373.4) BCW makes every effort to assure that in the care, adoption, discipline and control of any child receiving foster care at public expense, the religious faith of the child shall be preserved and protected.

2. For all children who are to be committed by the Commissioner of Welfare, it is the responsibility of the BCW to obtain documentary and other factual data regarding the religion of the child and his parents in order that referral may be made to an appropriate agency.

3. In individual situations, the Bureau Director or his designee will consult with the appropriate child-care federation or coordinating agency to resolve all questions about the religion of the child for the purposes of placement.

c. Determination of Religion for Purpose of Placement:

1. For the purpose of determining the agency to which children will be referred for foster care,

Appendix B.

BCW generally classifies children in three broad categories as Catholic, Protestant or Jewish.

2. Generally, the religion of a child for the purpose of placement is that of his parents if he is born in wedlock, or of his mother if he is born out of wedlock.

3. Children whose parents are not Catholic, Protestant or Jewish, are referred to agencies in accordance with their parents' wishes whenever possible."

* * * * * *

"d. Placements "Out-of-Religion":

1. Parents have the right to determine the religion of their child. When parents (or the mother only, if the child was born out of wedlock) desire to place their child in a religion other than their own, BCW will seek to carry out their wishes when this is deemed to be in the best interests of the child as well.

Whenever, in an individual situation, placement with an agency under the control of persons of the child's own religious faith or of the religion desired by the parents is found to be not practicable, BCW will seek placement of the child with any suitable agency which will provide religious training in the child's religious faith or in the faith designated by the parents.

2. Before any child can be referred for placement "out-of-religion," the Bureau Director or his designee will consult with the child-care coordinating federation or agency of the child's faith to review the availability of facilities for placement in the child's own faith. If the consultation establishes that there is no such placement resource

available that will meet adequately the child's needs, referral out-of-religion is to be made.

Except when a child is placed for temporary or interim care or in an emergency, individual case review, decision and approval by the Director are required whenever a child is to be placed, through DW commitment or inter-agency transfer, with a voluntary agency under the control of persons of a religious faith other than that of the child or other than that desired by the parents.

When a dependent child is committed "out-of-religion" by the Department of Welfare, the BCW record will contain a statement of the reasons for such disposition."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 542

IN THE MATTER

of

The Application of the RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, for an order directing the transfer of its assets and funds to the STATEN ISLAND MENTAL HEALTH SOCIETY, INC.

STATEN ISLAND MENTAL HEALTH SOCIETY, INC.,
Appellant,

RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, THE CHILDREN'S AID SOCIETY, MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN and the STATE OF NEW YORK,
Appellees.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

MARK F. HUGHES,
VINCENT R. FITZPATRICK,
Counsel for Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children.
15 Broad Street,
New York 5, New York

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 5-3

IN THE MATTER

of

The Application of the RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, for an order directing the transfer of its assets and funds to the STATEN ISLAND MENTAL HEALTH SOCIETY, INC.

STATEN ISLAND MENTAL HEALTH SOCIETY, INC.,
Appellant,

RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, THE CHILDREN'S AID SOCIETY, MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN and the STATE OF NEW YORK,
Appellees.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

Comes now the appellee Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children (hereinafter "Mission") and moves this Court pursuant to its Rule 16 to dismiss the appeal herein upon the following grounds:

1. It does not present a substantial federal question;

2. No federal question was expressly passed on by the New York Court of Appeals;

3. The order of the New York Court of Appeals appealed from rests on an adequate non-federal basis.

Statement.

The Jurisdictional Statement of appellant, which was delivered to this appellee on October 17, 1961, violates the implicit requirement of Rule 15 of this Court that it be accurate. It substitutes argument for fact and departs repeatedly from the record in the New York Court of Appeals on which the order appealed from was entered. Such tactics are designed to somehow convince this Court that it has jurisdiction of this appeal under 28 U. S. C. Sec. 1257 (2). The results of these tactics are the contrived federal questions which appellant claims are present.

This Court is entitled to the following accurate statement of the essential facts and of the progress of this proceeding through the courts of New York, supported in every respect by the record.

Richmond County Society for the Prevention of Cruelty to Children (hereinafter "SPCC"), a New York membership corporation, the purposes of which were "the prevention of cruelty to children and the enforcement of the laws relating to or in any wise affecting children", ceased to operate in Staten Island, New York in mid-1949 and was dissolved. Its board of directors thereafter instituted the subject *cy pres* proceeding in Supreme Court, Richmond County pursuant to the applicable statute (A-12-13)* seek-

* References are to pages of the appendices to the Jurisdictional Statement.

ing an order authorizing the transfer of all funds and assets of SPCC to appellant Staten Island Mental Health Society, Inc. (hereinafter "Mental Health"). Appellee The Children's Aid Society (hereinafter "Children's Aid"), the Mission and other charities were allowed to intervene and participated, together with the Attorney General of the State of New York, in a two day non-jury trial leading to Judge Baker's unrecorded decision (A-8-10) on which an order was entered July 9, 1957 directing, in substance, the division of the funds of SPCC equally between Children's Aid and the Mission.

Mental Health's motion for a new trial and other relief was denied by Judge Baker (A-10-11).

As noted, the Attorney General of the State of New York, acting through one of his assistants, took an active part in the hearings and took no appeal from the determination thereof.* Illustrative of appellant's use of unauthenticated, non-record material are its arguments on pages 7-9 of the Jurisdictional Statement relating to the Attorney General and referring to an alleged conversation with "the Attorney General's office" and a letter from the Solicitor General of the State of New York. Neither item, of course, was ever part of the record herein and references thereto are as immaterial as they are improper.

Appellant's appeal from the orders entered pursuant to Judge Baker's decisions resulted in the *per curiam* decision and opinion of the Appellate Division, Second Department (A-4-8) holding that an unsuccessful claimant in a *cy pres* proceeding had no standing to appeal since it was not a party or person aggrieved within the meaning of the

* It is clear that he was duty bound to do so if he believed that a wrong class of beneficiaries had been selected *cy pres*, a duty which is in no way contingent upon the number of charities involved (A-7, 12; *Matter of Durbrow*, 245 N. Y. 469).

controlling statute, New York Civil Practice Act, §557 (A-13). The Appellate Division noted (A-8) that although there were New York cases in which appeals by unsuccessful *cy pres* claimants had been entertained, the point of their right to appeal had not been raised therein and in some the Attorney General had appealed.* It also noted (A-8) that appellant had no inherent right to appeal because it was a party to the proceeding at Special Term and that nothing could confer such right of appeal absent statutory authority. This, of course, disposed of the argument that the appellees, who had moved to dismiss the appeal well before it was argued, had somehow waived their right to raise the point of appellant's right to appeal. The time within which an appeal may be taken has nothing to do with the timeliness of a motion to dismiss an appeal.

The New York Court of Appeals affirmed the order of the Appellate Division, Second Department (A-1). Its remittitur was amended to allow costs upon appellant's motion but it declined to amend the remittitur so as to include a statement that federal questions were argued and necessarily passed upon by it. The appellant appeals from the order of affirmance of the New York Court of Appeals entered May 18, 1961 (A-2-4).

Thus no New York appellate court reached the merits of the disposition *cy pres* ordered by Judge Baker. Notwithstanding this fact, appellant has presented argument of the merits *in extenso* in its Jurisdictional Statement. It ignores Children's Aid and contends essentially that the disposition ordered by Judge Baker was error because the Mission is sectarian and an award to it of nonsectarian

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* *Matter of Directors of Equitable Fire and Police Fund*, 267 App. Div. 761, which merely affirmed orders permitting intervention, did not raise the point of the right of an unsuccessful *cy pres* claimant to appeal.

funds violates the Constitution of the United States. On this basis it asks this Court *inter alia* to reverse all of the New York courts without plenary consideration and oral argument.

To support its position appellant has included in the Jurisdictional Statement (p. 17) a portion of a pamphlet published by the Mission for the purposes of circulation among and solicitation of funds from Roman Catholic patrons of the child-caring institution conducted by the Mission, which pamphlet was an exhibit to the Mission's brief after trial,* and has based its allegations that the Mission is a "sect" and sectarian thereon. In its treatment of this matter of the merits, however, appellant assiduously avoided the record which, for example, contains the Mission's certificate of incorporation providing for nonsectarian purposes and practices. The record also affirmatively establishes that the Mission follows a nonsectarian intake policy and practice to the extent permitted by New York law (A-15) in caring for homeless, destitute and neglected children regardless of race, color or creed.

Appellant similarly urged its version of the merits on the New York Court of Appeals which refused to consider the same in light of the only issue before it, viz., the right of appellant, an unsuccessful claimant in a *cy pres* proceeding, to appeal. This is clear even from the decision of the minority in the Court of Appeals (A-1).

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* This pamphlet was never printed as part of the record but was included in briefs submitted to the New York courts and referred to as one of the documents on which Judge Baker's order denying appellant's motion for a new trial and other relief was entered. Because it was not a record paper contemplated by Rule 12 of this Court, objection to its transmittal has been made and filed in this Court.

POINT I.

There is no substantial federal question present on this appeal.

The holding of the New York Court of Appeals did not change the New York law of *cy pres* by making the same *prerogative* rather than *judicial* as contended by appellant in its Jurisdictional Statement (pp. 11-13). The proceedings in the New York State courts were obviously judicial in character and the decisions therein allow appeal in *cy pres* proceedings by the Attorney General. Moreover, the New York appellate courts properly found persuasive the decisions of Massachusetts and Connecticut. These jurisdictions and, in fact, all jurisdictions of the United States, have always rejected any form of prerogative *cy pres*. See *Scott on Trusts*, §§348.3, 399.1; *Restatement of Trusts*, §399.

As noted, the point of the right of an unsuccessful *cy pres* claimant to appeal was not raised, much less decided, in New York before the instant proceeding (A-8). Appellant, of course, had the opportunity, and availed itself of it fully, to present its case at Special Term. Its only real complaint now is that its best laid plans have gone awry.

Accordingly appellant's claim that the order appealed from is novel and prejudicially retroactive so as to warrant review by this Court is factually and legally untenable. It is not supported by *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 and *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449.

In the *Brinkerhoff* case an aggrieved taxpayer sought review by this Court on a record which indicated that he

could obtain no relief from an alleged discriminatory assessment in Missouri in that his property had been exacted with no opportunity to be heard and to defend against the exaction. The statement of the governing principles by this Court disposes of appellant's contentions herein (pp. 680-682):

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.
>
> "But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the *Laclede* case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to re-examine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our

review.[8] But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.[9] • • •

"[8] The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions. • • •

"[9] Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own. Likewise, if the administrative remedy were still available to the plaintiff, there would be no denial of due process in that regard."

Here, of course, there had been no previous construction of the New York statute governing appeals as related to unsuccessful *cy pres* claimants and consequently appellant was in the position of the aforementioned plaintiff who had to assume the risk that the ultimate interpretation by the highest State court might differ from its own, which it did. Moreover, appellant had a full hearing before Judge Baker who also entertained its motion for a new trial and heard the same at length. Due process does not require that an appellant be given a right to appeal. *National Union* v. *Arnold*, 348 U. S. 37, 43 (1954).

The *NAACP* case, which followed *Brinkerhoff*, involved a contrived novel State procedural requirement designed

to frustrate a colored appellant and is manifestly not even remotely germane.

There being no substantial federal question present on this appeal, this Court should dismiss the appeal. *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U. S. 390, 391 (1952); *CIO* v. *McAdory*, 325 U. S. 472, 477 (1945); *Abrams* v. *Van Schaick*, 293 U. S. 188, 189 (1934).

POINT II.

No federal question was expressly passed on by the New York Court of Appeals.

Despite appellant's application that the Court of Appeals amend its remittutur to state that federal questions were necessarily passed upon by it, that Court refused to do so and denied appellant's motion to so amend its remittitur. This action of the Court of Appeals makes clear its opinion that no federal question was expressly passed on by it. While admittedly this is not conclusive on this Court, it is entirely consistent with the record and highly indicative of the fact that no federal question was passed on by the New York Court of Appeals. Therefore there should be no review by this Court. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54 (1934).

POINT III.

The order appealed from rests on an adequate non-federal basis.

The sole question before the New York Court of Appeals was the correctness of the decision of the Appellate Division of the Supreme Court, Second Department, that an unsuccessful claimant in a *cy pres* proceeding was not a party

aggrieved and hence had no right of appeal under the New York Civil Practice Act, §557 (1) (A-4-8, 13). There was no consideration by such New York courts of appellant's alleged constitutional questions and arguments because these courts found that appellant had no legal right or interest in the funds transferred and hence no standing on appeal to urge such questions and arguments (cf. *Schieffelin* v. *Komfort*, 212 N. Y. 520, 533; *Bull* v. *Stiehman*, 273 App. Div. 311, aff'd 298 N. Y. 516) (A-7).

The right of appeal in New York is a creature of the New York statute, CPA §557 (1), which it was the duty and right of the New York courts to interpret. *People ex rel. Schick* v. *Marvin*, 271 N. Y. 219. This they did and held, as a matter of New York law, that appellant, an unsuccessful *cy pres* claimant, had no right to appeal. Consequently, the order appealed from rests on a perfectly sound State basis and, therefore, on an adequate non-federal basis. There should be no review by this Court. *Herb* v. *Pitcairn*, 324 U. S. 117, 125 (1945).

Conclusion.

The motion to dismiss the appeal should be granted.

October 31, 1961

Respectfully submitted,

Mark F. Hughes,
Vincent R. FitzPatrick,
Counsel for Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children.

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 503.

IN THE MATTER

of

The Application of the RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, for an order directing the transfer of its assets and funds to the STATEN ISLAND MENTAL HEALTH SOCIETY, INC.

STATEN ISLAND MENTAL HEALTH SOCIETY, INC.,
Appellant,

RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, THE CHILDREN'S AID SOCIETY, MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN and the STATE OF NEW YORK,
Appellees.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

SIGMUND A. GRAJEWSKI,
JOHN A. LYNCH,
Counsel for The Children's Aid Society,
152 Stuyvesant Place,
Staten Island 1, New York.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 503.

IN THE MATTER

of

The Application of the RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, for an order directing the transfer of its assets and funds to the STATEN ISLAND MENTAL HEALTH SOCIETY, INC.

STATEN ISLAND MENTAL HEALTH SOCIETY, INC.,
Appellant

RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, THE CHILDREN'S AID SOCIETY, MISSION OF THE IMMACULATE VIRGIN FOR THE PROTECTION OF HOMELESS AND DESTITUTE CHILDREN and the STATE OF NEW YORK,
Appellees.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

Appellee, The Children's Aid Society, moves the Court to dismiss the appeal herein on the following grounds:

1. It does not present a substantial federal question;

2. No federal question was expressly passed on by the New York Court of Appeals;

3. The order of the New York Court of Appeals appealed from rests on an adequate non-federal basis.

Statement.

The Jurisdictional Statement follows the pattern used continuously by appellant since the Court of original jurisdiction decided that the appellees, Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children (hereinafter "Mission") and The Children's Aid Society, were most nearly akin to the old Richmond County Society for the Prevention of Cruelty to Children (hereafter "SPCC") and ordered distribution of the funds of the SPCC to them. Appellant always retried the whole case inside and outside the record and forced The Children's Aid Society to range far and wide in its briefs in the hope that it could answer most if not all of the statements appellant put forward. Illustrative of this is The Children's Aid Society's brief to the Court of Appeals on the appeal from the decision of the Appellate Division, Second Department, a copy of which is submitted herewith.

Appellant states in its Jurisdictional Statement (p. 6) that S. P. C. C. "chose to proceed under the *cy pres* statute, with a strong case to support the director's judgment". Here it is dealing in irrelevancies and does not tell the whole story. Appellant does not call to mind that in 1955 counsel for S. P. C. C. argued its right to withdraw the *cy pres* application and that the then counsel for appellant filed a brief in support of the motion to withdraw. This was at the time of the application of The Children's Aid Society and other charities to intervene. The motion to withdraw was not pursued. Actually it was not a proper motion for these were public funds under the jurisdiction of the Supreme Court which in New York has jurisdiction over charities. Once the condition of the S. P. C. C. was brought to the Court's attention, it had to act in the matter.

Matter of Herman, 177 Misc. 276, Supreme Court, Cattaraugus County. This matter is not pertinent and with but one more omission in regards to the letters of the Attorney General, irrelevant statements of appellant will go unchallenged.

This proceeding involved the funds of the S. P. C. C. which had closed its doors in 1949 and was thereafter dissolved. The board of directors of the S. P. C. C. petitioned the Court for leave to transfer its funds to appellant, Staten Island Mental Health Society, Inc. (hereinafter Mental Health). The Children's Aid Society, the Mission and several other societies were allowed to intervene and after a trial in the Supreme Court of Richmond County in which the Attorney General participated fully, the funds were ordered by Judge Baker (A8-10) to be distributed as indicated above. After denial of the right to a new trial, appellant appealed and its appeal was dismissed (A4-8) on the ground that appellant was not a party aggrieved. This decision was affirmed by the Court of Appeals (A-1) which, while amending its remittitur to allow costs, failed to include a statement in the remittitur that federal questions were argued and necessarily passed upon. Appellant appeals from the order of affirmance of the New York Court of Appeals (A2-4).

It is clear that the sole question in the appellate courts was the right of a disappointed *cy pres* claimant to appeal.

This appellee, The Children's Aid Society, is no more than a name in appellant's brief. The Children's Aid Society is non-sectarian as all will admit, but appellant does not bother to state. Appellant also neglects to state that the letter writing Solicitor General subsequently and by letter apologized for his famous letter as far as The Children's Aid Society was concerned and then we heard no

more from him. No basis exists here for reversal by this Court as asked by appellant in its Jurisdictional Statement (p. 22).

This appellee asks the Court to go forward with the Court of Appeals and dismiss this appeal.

POINT I.

There is no substantial federal question present on this appeal.

The confusion as to prerogative and judicial *cy pres* has settled heavily upon appellant's argument. However interesting a study of *cy pres* might be, it is safe to say that without such an exacting and unsatisfactory voyage, one can reach the conclusion that prerogative *cy pres* was never a part of judicial procedure in these United States. RESTATEMENT OF TRUSTS §399.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673 is not authority for appellant on this appeal. While the question of whether a disappointed *cy pres* claimant was a party aggrieved had never been raised nor adjudicated in New York, decisions had disposed of other cases on this ground. *Matter of Hodgman*, 140 N. Y. 421, *Bryant* v. *Thompson*, 128 N. Y. 426. All the Court of Appeals and the Appellate Division did was decide that appellant was not aggrieved. It was not a new theory, but an application of an old one. Here also appellant had its day in the Court of original jurisdiction. Again unlike the cases of *Brinkerhoff* and *National Association for Advancement of Colored People* v. *Alabama*, 357 U. S. 449, appellant had no property or right which was affected. While the funds were given to the Mission and this appellee, nothing was taken from appellant and the non-appealing charities who were involved.

Appellant had no interest in the funds which the Constitution could protect. The Attorney General represented the beneficiaries of the fund. *Trustees of Sailors Snug Harbor* v. *Carmody*, 158 App. Div. 738, aff'd 211 N. Y. 286. The public welfare is in the hands of the Attorney General, not in the hands of appellants.

POINT II.

No federal question was expressly passed on by the Court of Appeals.

The appellant requested the Court of Appeals to state that a federal question was necessarily passed upon and that Court failed to do so. It is clear that the Appellate Division decision (A4-8) did not consider federal questions and it would seem to follow logically that the Court of Appeals in affirming did not consider such questions either. There should be no review by this Court. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54.

POINT III.

The order appealed from rests on an adequate non-federal basis.

Appellate jurisdiction is purely statutory. In New York it is governed by §557 (1), (A-13). Appellant failed to show it was aggrieved and therefore it could not complain in the appellate courts. This rule in New York covers all appeals and is not unique or different in its application to charitable cases. Appellant must have suffered a loss of right or property before it can appeal. Appellant was not in a position to object in the State Appellate Courts. *Matter*

of Hodgman, supra. It is not in a position to object here, *Lampasas* v. *Bell*, 180 U. S. 276. *The Winebago*, 205 U. S. 354.

Conclusion.

The motion to dismiss the appeal should be granted.

November 3, 1961.

Respectfully submitted,

SIGMUND A. GRAJEWSKI,
JOHN A. LYNCH,
Counsel for The Children's Aid Society.